Malayan Banking Bhd v Mahmood Zuhdi Hj Mohd Nor

HIGH COURT (KOTA BHARU) — CIVIL ACTION NO 22–17 OF 1993
SURIYADI J
25 MARCH 2001

Civil Procedure *— Judgment and orders — Setting aside, application for — Judgment in default of appearance entered six years ago — Defective service of judgment on defendant — No application made to extend time for setting aside — Whether court had statutory powers or inherent jurisdiction to set aside judgment in default — Regularity of judgment irrelevant — No explanation for delay in applying for setting aside — Whether application should be allowed*

The plaintiff filed a writ of summons against the defendant at the High Court. It was served on the defendant by way of substituted service, ie, by posting the writ at the defendant's last known address. The defendant failed to enter appearance, prompting the plaintiff to enter a judgment in default of appearance ('JID') against the defendant. The defendant made no effort to have the JID against him set aside until more than six years later, when he filed a summons in chambers (encl 10). Its premise was that as the service was bad, the JID order was thus a nullity and must be set aside. The senior assistant registrar ('SAR') dismissed the application, leaving the JID unscathed. The defendant then filed a notice of appeal to the judge in chambers (encl 15). At the commencement of the hearing, the plaintiff raised a preliminary objection stating that the defendant's application in encl 10 was defective as it was against O 42 r 13 of the Rules of the High Court 1980 ('the RHC'). The plaintiff's counsel submitted that the defendant's application was long overdue, and that the application should be dismissed. The court had to consider whether it was endowed with the statutory powers or the inherent jurisdiction to have the order set aside.

Held, allowing the preliminary objection and dismissing the defendant's application:

(1) The court was painfully aware of the fact too that O 42 r 13 of the RHC had not provided for any provisions for any extension of time, for purposes of abridgment of time. After due deliberation, the court was of the opinion that an interested party in such a predicament could advert to O 3 r 5 of the RHC, to extend the time but subject to an application. In the current case, as no application was made pursuant to the latter sub-provision, purposefully to abridge the period prescribed under O 42 r 13 of the RHC, the statutory remedy available to the defendant therefore had slipped away. The residual remedy that could possibly assist the defendant was the court's inherent powers, as laid down in *Tuan Haji Ahmed Abdul Rahman v Arab Malaysian Finance Bhd* [1996] MLJ 30 (see p 214A–B).

(2) As far as the court was concerned, regardless of the quality of a JID order be it a nullity or a mere irregular one, the court could set aside such judgment, even though out of time. But it is the court's view that to invoke that inherent power, the court must scrutinize the matter with a fine-toothed comb, especially the reasons for the delayed application. Nothing should be implanted in the mind of a defaulting litigant that exploiting the subjective sensitivities of a judge could circumvent mandatory statutory provisions (see p 214F–G).

(3) The defendant's counsel ventilated that the judgment was bad, on the premise that it was obtained through a bad and irregular service of the writ of summons on the defendant. He alleged that the writ was served at an address different to the one that appeared in the agreement. Having scrutinized the evidence, the court had to agree that the writ was indeed served on the defendant by way of substituted service ('SS'), ie through posting the said summons at the defendant's last known address, as per the address on the summons and not as provided for in the agreement. Further, the court was convinced that the writ was served by way of SS at that address, by reason of there being a proper court order to serve the writ at that last known address (encl 5, per order dated 9 September 1993). As far as the court was concerned, with it being a good court order, and unless and until set aside, that order must stand and must be obeyed to the letter, if resorted to (see pp 214H–215B).

(4) The court had sifted through the evidence to see whether the defendant had managed to come up with a satisfactory explanation for the delay. It found none. The defendant's counsel's failure left the court with the impression that the delay was purely self-inflicted, the outcome of the unreasonable procrastination. Apart from the period of delay being exceptionally long, the court had to bear in mind too that justice not only was the domain of a defaulting defendant, but also the plaintiff's (see pp 215I–216A).

[Bahasa Malaysia summary

Plaintif telah memfailkan satu writ saman terhadap defendan di Mahkamah Tinggi. Ia telah disampaikan ke atas defendan melalui penyampaian gantian, iaitu, dengan memposkan writ tersebut kepada alamat terakhir defendan yang diketahui. Defendan telah gagal untuk memasuki kehadiran, yang menyebabkan plaintif memasuki satu penghakiman ingkar kehadiran ('PIK') terhadap defendan. Defendan tidak membuat apa-apa usaha untuk mengetepikan PIK terhadap beliau sehingga lebih enam tahun kemudian, apabila beliau telah memfailkan satu saman dalam kamar (lampiran 10). Ia berdasarkan bahawa memandangkan penyampaian tersebut tidak betul, perintah PIK tersebut oleh itu adalah satu pembatalan dan mestilah

diketepikan. Penolong kanan pendaftar ('PKP') telah menolak permohonan tersebut, meninggalkan PIK tersebut tidak terusik. Defendan kemudiannya telah menimbulkan satu bantahan awal menyatakan bahawa permohonan defendan di dalam lampiran 10 adalah defektif kerana ia bertentangan dengan A 42 k 13 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Peguam plaintif menghujahkan bahawa permohonan defendan teramat lewat, dan permohonan tersebut sepatutnya ditolak. Mahkamah perlu mempertimbangkan sama ada ia dianugerahkan dengan kuasa-kuasa statutori atau bidang kuasa sedia ada untuk mengetepikan perintah tersebut.

Diputuskan, membenarkan bantahan awal tersebut dan menolak permohonan defendan:

(1) Mahkamah jelas mengetahui hakikat bahawa A 42 k 13 KMT tidak memperuntukkan apa-apa peruntukan bagi apa-apa lanjutan masa, bagi tujuan melanjutkan masa. Setelah pertimbangan sewajarnya, mahkamah berpendapat bahawa satu pihak yang berkepentingan dalam satu keadaan boleh merujuk kepada A 3 k 5 KMT, bagi melanjutkan masa tetapi tertakluk kepada satu permohonan. Di dalam kes sekarang ini, memandangkan tiada permohonan telah dibuat menurut sub-peruntukan terdahulu, yang bertujuan untuk melanjutkan tempoh yang dinyatakan di bawah A 42 k 13 KMT, remedi statutori yang ada kepada defendan oleh itu telah terlepas. Remedi residual yang boleh membantu defendan adalah kuasa-kuasa sedia ada mahkamah, sebagai mana yang dinyatakan dalam *Tuan Haji Ahmed Abdul Rahman v Arab Malaysian Finance Bhd* [1996] MLJ 30 (lihat ms 214A–B).

(2) Sejauh mana mahkamah berkenaan, tidak mengira kualiti sama ada satu perintah PIK itu satu pembatalan atau hanya satu luar aturan, mahkamah boleh mengetepikan penghakiman sedemikian, walaupun di luar masa. Tetapi ia adalah pandangan mahkamah bahawa untuk menggunakan kuasa sedia ada tersebut, mahkamah mesti meneliti perkara tersebut dengan terperinci, terutamannya sebab-sebab kelewatan permohonan-permohonan tersebut. Tiada apa-apa sepatutnya dibenamkan ke fikiran seorang litigan yang ingkar bahawa menyalahgunakan kesensitifan subjektif seorang hakim boleh memintas peruntukan-peruntukan statutori yang mandatori (lihat ms 214F–G).

(3) Peguam defendan menyuarakan bahawa penghakiman tersebut tidak betul, berdasarkan bahawa ia telah diperolehi melalui satu penyampaian writ saman yang tidak betul dan luar aturan ke atas defendan. Beliau mengatakan bahawa writ tersebut telah disampaikan ke alamat berbeza daripada yang tertera dalam perjanjian. Setelah meneliti keteranagn tersebut, mahkamah bersetuju bahawa writ tersebut sememangnya telah disampaikan

ke atas defendan melalui penyampaian gantian ('PG'), iaitu dengan memposkan saman tersebut melalui PG ke alamat tersebut, atas sebab terdapat satu perintah mahkamah yang betul untuk menyampaikan writ tersebut ke alamat terakhir yang diketahui (lampiran 5, seperti mana perintah bertarikh 9 September 1993). Sejauhmana mahkamah berkenaan, dengan perintah mahkamah yang sah tersebut, dan kecuali dan sehingga diketepikan, perintah tersebut mestilah kekal dan mestilah dipatuhi dengan ketat, jika ia dirujuk sedemikian (lihat ms 214H–215B).

(4) Mahkamah telah meneliti keterangan tersebut untuk melihat sama ada defendan telah berupaya untuk memberikan satu penjelasan yang memuaskan tentang kelewatan tersebut. Tiada apa-apa yang ditemui. Kegagalan peguam defendan meninggalkan satu gambaran kepada mahkamah bahawa kelewatan tersebut jelas disengajakan, akibat daripada tangguhan yang tidak munasabah. Selain daripada tempoh kelewatan yang luar biasa lewatnya, mahkamah perlu mengmbilkira juga bahawa keadilan bukan sahaja domain seorang defendan yang ingkar, tetapi juga plaintif (lihat ms 215I–216A).]

Notes

For cases on application to set aside a judgment, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2729, 2790–2800.

Cases referred to

Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal [1995] 3 MLJ 472 (refd)

Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 (refd)

Tuan Haji Ahmed Abdul Rahman v Arab Malaysian Finance Bhd [1996] MLJ 30 (refd)

Legislation referred to

Rules of High Court 1980 O 3 r 5, O 13 r 8, O 42 r 13
Rules of the High Court (Amendment) Rules 1993 O 42 r 13

Wan Azman bin Wan Ahmad (*Lua & Mansor)* for the plaintiff.
Zainal Abidin bin Mustaffa (*Zainal & Mariani*) for the defendant.

Suriyadi J. : Sometime on 11 January 1993, the plaintiff had filed a writ of summons against the defendant at the High Court. On 10 October 1993, it was served on the defendant by way of substituted service, ie by posting the said writ at the defendant's last known address. The defendant, however, did not enter appearance, hence prompting the plaintiff to enter a judgment

in default of appearance ('the JID') against the defendant on 12 December 1993.

The defendant, however, made no effort to have the JID against him set aside until more than six years later, when he, through his counsel, filed a summons in chambers (encl 10). The premise of the application was that as the service was, had it been served at the last known address instead, the JID order thus was a nullity and must be set aside. The application was first heard before the senior assistant registrar ('the SAR'), and upon hearing the application, dismissed it thus, leaving the JID unscathed.

Being dissatisfied with that decision, the defendant again through his counsel filed a notice of appeal to the judge in chambers (encl 15). At the commencement of the hearing of the notice of appeal before me, the plaintiff's counsel had raised a preliminary objection, stating that the defendant's application in encl 10 was defective as it rebelled against O 42 r 13 of the Rules of High Court 1980 ('the RHC'), which provides:

> Where in these rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or vary such order or judgment must make his application to the court and serve it on the other party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

Adverting to the above provision, the plaintiff's counsel adamantly submitted that the defendant's application was long overdue, ie more than six years after the JID had been entered and served on the defendant. He contended that the application should therefore be dismissed, without the necessity of any consideration of the merits of the case. In a gist therefore, I had to consider, inter alia, whether I was endowed with the statutory powers or alternatively possessed the inherent jurisdiction to have the order set aside, in the circumstances of the case.

As the matter under discussion concerned an order of JID of appearance, O 13 of the RHC is of significance particularly O 13 r 8 of the RHC, as the defendant had wanted to set aside that order. This sub-rule reads:

> 8 The court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this order.

Perusing O 13 of the RHC, it is indisputable that this provision is silent on the time frame factor, particularly as to when a party should take steps to set aside that order. Be that as it may, O 42 r 13 of the Rules of the High Court (Amendment) Rules 1993 (effective 1993) ('the Rules'), provides that a party intending to set aside or to vary such order or judgment must make his application to the court, and serve it on the party who has obtained the order or judgment, within 30 days after the service of the order of judgment on him. Since a judgment in default of appearance order may be set aside, as permitted by O 42 r 13 of the Rules, the stringent requirement of making the application and serving it on the party who has obtained the judgment within 30 days after receipt of the order or judgment must be adhered to. But what if an aggrieved or interested party were to be out of

time, as in this case, what then should it do? I was painfully aware of the fact too that this sub-rule had not provided for any provisions for any extension of time, for purposes of abridgment of time. After due deliberation, I was of the opinion that an interested party in such a predicament could advert to O 3 r 5 of the RHC, to extend the time but subject to an application. In the current case, as no application was made pursuant to the latter sub-provision, purposefully to abridge the period prescribed under O 42 r 13 of the Rules, the statutory remedy available to the defendant therefore had slipped away. The residual remedy that could possibly assist the defendant was my inherent powers, as laid down in *Tuan Haji Ahmed Abdul Rahman v Arab Malaysian Finance Bhd* [1996] MLJ 30.

A scrutiny of exh 'AW-1' in encl 12, a letter from the plaintiff to the defendant dated 8 February 1994, revealed a covering letter enclosing a copy of the JID meant for the defendant. This fact, prima facie proved that the defendant did receive a copy of the JID order, and thus could not deny that he had knowledge of it way back in 1994.

Needless to say, due to the nature of the matter at hand, a scrutiny of the words found in 'Held: 6' in the case of *Tuan Haji Ahmed Abdul Rahman v Arab Malaysian Finance Bhd*, which emanated from a Federal Court's decision will be necessary. It reads:

> In this case, the delay was not fatal to the applicant's application *since the default judgment was by reason of uncertainty, a nullity*. Under the court's inherent jurisdiction to prevent abuse of its proceedings, *the court has power to set aside the judgment in default, despite the appellant's application being out of time*. (Emphasis added.).

A brief reading will reveal that if the default judgment were a nullity, then the court possessed the power to have such order be set aside, even if the application were made out of time. Interestingly enough, nothing was said of the court's power with regard to a default judgment that could be categorized as not a nullity. As far as I was concerned, regardless of the quality of a JID order be it a nullity or a mere irregular one, the court could set aside such judgment, even though out of time. But it is my view that to invoke that inherent power, the court must scrutinize the matter with a fine-toothed comb, especially the reasons for the delayed application. Nothing should be implanted in the mind of a defaulting litigant, that exploiting the subjective sensitivities of a judge could circumvent mandatory statutory provisions.

With the legal premises established, regardless of the delay, should I have immediately acquiesced to the assertion of the defendant that as the service was bad, the JID order thus was nullified and hence must be set aside? In other words, the defendant had wanted me to go behind the judgment, ie all the way back to the early stages of the action. In his submission, the defendant's counsel ventilated that the judgment was bad, as said above, on the premise that it was obtained through a bad and irregular service of the writ of summons on the defendant. He alleged that the writ was served at an address different to the one that appeared in the agreement. Having scrutinized the evidence, I had to agree that the writ was

indeed served on the defendant by way of substituted service ('SS'), ie through posting the said summons at the defendant's last known address, as per the address on the summons and not as provided for in the agreement. Further, I was convinced that the writ was served by way of SS at that address, by reason of there being a proper court order to serve the writ at that last known address (encl 5, per order dated 9 September 1993). As far as I was concerned, with it being a good court order, and unless and until set aside, that order must stand and must be obeyed to the letter, if resorted to.

In support of my view, I refer to the case of *Development Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 472, where the Supreme Court decided, as seen in holdings 1:

> The order of substituted service of the High Court must be obeyed save in a few exceptions and its validity can only be challenged by proceedings instituted for the very purpose. It cannot be challenged collaterally in other proceedings. Here, the judge had obviously considered the validity of the order of the substituted service when it was not a subject matter of an application for its discharge and made the error of adjudicating on its validity in proceedings which were not filed for the purpose of setting aside the order or service in pursuance thereof ...

In deference to the above decision, the defendant thus should have initiated a separate proceeding first, of setting aside the SS order, as otherwise that latter order still subsisted. With the SS order being good and with the JID being founded on it, the latter thus must still remain good and regular. The applicant defendant here had erroneously raised the irregularity issue of the SS order at the setting aside application, when such matters should have been dealt with first in another action altogether.

With the issue of improper service out of the way, I now deal with the question as to whether the issue of delay could be ignored and waived, bearing in mind it being a JID of appearance order per se, one not based on the merits of the case. I appreciated the fact as admitted above, that there are prevailing authorities, which support the contention of the defendant. Having said that, I was also aware of the plaintiff's predicament, ie of being caught by surprise by this unexpected application, after the defendant had left the judgment to remain undisturbed for six long years. It is trite law that any action to be undertaken, must be timeously done, especially if no specific time frame is supplied by Parliament.

In *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396, the Court of Appeal at holdings 1 and 2 had this to say:

> It is the cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to *render a satisfactory explanation for it.* (Emphasis added.)

Guided by the remarks of the above case, I had sifted through the evidence to see whether the defendant had managed to come up with a satisfactory

explanation for the delay. I found none. The defendant's counsel's failure left me with the impression that the delay was purely self-inflicted, the outcome of the unreasonable procrastination. Apart from the period of delay being exceptionally long, I had to bear in mind too that justice not only was the domain of a defaulting defendant, but also the plaintiff's.

In conclusion, taking into account all the factors presented above, I had no hesitation in allowing the plaintiff's preliminary objection, and accordingly dismissed the defendant's application with costs.

I have not touched on the issue of whether the defendant should have appealed against the JID order, instead of alluding to this setting aside application, as none of the contending parties had submitted on this approach. I could only speculate that his unwillingness to appeal was either due to the fact that, 'provisions were made for the setting aside (or varying) of any order' (O 13 r 8 of the RHC), or the period of setting aside had been exhausted (O 42 r 13 of the Rules). Had there been no provisions promulgated to set aside, then, if still within the prescribed time, filling the necessary notice of appeal would have been the next best course of action (O 56 r 1 of the RHC). In the circumstances of the case, as the defendant was out of time, applying for the JID to be set aside by invoking the judge's inherent jurisdiction was the most legally sensible thing to do. Success is a separate and different matter.

Preliminary objection allowed, defendant's application dismissed.

Reported by Wong Ee Lynn